Filed 5/07/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID LAWRENCE DYKE, Defendant and Appellant.	A117955 (Solano County Super. Ct. No. FCR222246)

THE COURT:

The petition for rehearing filed by respondent on April 16, 2009, is denied. The motion for judicial notice filed by respondent on April 16, 2009 is also denied.

The opinion filed herein on April 9, 2009, is ordered modified as follows:

1. On page 4, second paragraph (beginning "The Legislature adopted"), end of second sentence, add footnote to read " 'Under the provisions of § 9 of Stats. 1988, c. 1392, the 1988 amendments of [section 313] by c. 1378 and c. 1392 were given effect and incorporated in the form set forth in § 5 of c. 1932.' (Historical and Statutory Notes, 48 West's Ann. Penal Code (2008 ed.) foll. § 313, p. 548, col. 2.)"

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.B. and II.C. (slip opn. at pp. 9-11).

2. On page 5, first paragraph (beginning "Thus, the modern *Miller* standard"), second sentence, delete "With these limited exceptions," and replace with "In essence, then,"

3. On page 5, first paragraph, end of second sentence, add ", except that its socially redeeming values must be of a nature that can be appreciated by a minor.[1]"

4. On page 5, first paragraph, fourth sentence, delete "If it is not," and replace with "If this test is not met,"

5. On page 7, first paragraph (beginning "We conclude there is insufficient evidence"), second sentence, delete "nudity is not necessarily obscene" and replace with "nudity alone is not per se obscene"

6. On page 7, first paragraph, fifth sentence, delete "may not be per se obscene" and replace with "are not ipso facto obscene"

7. On page 7, end of first paragraph, add "As the court stated in *Roth v. United States* (1957) 354 U.S. 476, 487, 'sex and obscenity are not synonymous.' Accordingly, in order to determine whether a portrayal of sex is patently offensive to the average adult, '[a] reviewing court must, of necessity, look at the context of the material, as well as its content.' (*Kois, supra*, 408 U.S. at p. 231.) [¶] What is missing from this record is any context by which the reasonable trier of fact can make this determination. There is only a bare-bones recital by A.S. of what she saw: a nude woman dancing and a naked couple having sex, shown from the waist up, and her own characterization of it as 'pornography.' Without more, neither we nor the jury are permitted to presume that such content is patently offensive to the average adult, applying statewide community standards."

8. On page 7, second (carry-over) paragraph (beginning "Second, even"), first sentence, delete "Second, even" and replace with "Even"

"[1] We would assume such a measure would differ based upon the age of the minor; certain sexual portrayals may be viewed as having artistic value to a 16-year-old, but not to a seven-year-old."

9. On page 8, second (carry-over) paragraph (beginning “It is impossible on this record”), first sentence, delete “were not part of a work that contained” and replace with “did not contain”

There is no change in the judgment.

DATED: _____P. J.

Trial Court:	Superior Court of Solano County
Trial Judge:	Honorable Mike Nail
Attorney for Appellant:	Richard T. Dudek Jeffrey Kravitz
Attorney for Respondent:	Edmund G. Brown, Jr. Attorney General Dane R. Gillette Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Martin S. Kaye Christopher W. Grove Deputy Attorneys General